ATTACHMENT: CONDITIONAL SALE CONTRACTS.—The question of interest in *Standard Auto Sales Co. v. Lehman*[1] is whether the seller in a contract of sale of an automobile providing that the seller should retain title thereto until all the installments of the price were paid and giving the seller the right to retake possession in case of default in the payment of any such installments, is entitled to attach property belonging to the defendant. The case holds that he can.

The California law on this subject provides that an attachment will lie if the contract is not secured by any mortgage or lien upon real or personal property or any pledge of personal property. Plainly the vendor in this case has no mortgage, lien or pledge. But the question arises whether the statute contemplates other kinds of security than those specifically mentioned.

The court seems to solve the matter readily by stating the general rule that statutes on attachment must be strictly construed, citing Clyne v. Easton, Eldridge and Co.[3] It is true that in most jurisdictions, of which California is one, the rule of strict construction is applied. This rule, however, means construction strictly in favor of those against whom the statute is being applied and against those seeking to take advantage thereof.[4] And in the case cited by the court it was held that an attachment of "moneys, credits and effects" did not include an indebtedness due the defendant, relying on the rule that attachment statutes shall be strictly construed. Each case cited in that opinion was an application of strict construction against the person seeking to levy the attachment.

It is also to be observed that, in interpreting the section of the Practice Act on attachment, it was held that, though the statute read "secured by a mortgage," it was broad enough to include a pledge which, as the court said, is "essentially the same and intended to accomplish the same end."[5] Taking the principle of that case, in which the statute was not limited to the class of security specifically mentioned therein, and correctly applying the principle of strict construction of attachment statutes, it would appear that the court could have refused to allow the attachment.

Looking at other jurisdictions which have a similar statutory provision, it is seen that Montana is in line with the principal case in interpreting a similar code section.[6] In Idaho, however, where the code provision is very similar,[7] the court refused to allow an attachment where the seller retained title in himself on the ground that, though the seller had no mortgage, lien or pledge, he had a security which was a "higher class of security than either a

[1] (1919) 30 Cal. App. Dec. 394, 186 Pac. 178.
[2] Cal. Code Civ. Proc. § 538.
[3] (1905) 148 Cal. 287, 83 Pac. 36.
[4] 6 C. J., § 12, p. 36.
[5] Payne v. Bensley (1857) 8 Cal. 260.
[6] Mont. Rev. Codes, § 6656; State v. Justice of Peace Court of Billings Tp., Yellowstone Co. (1915) 51 Mont. 133, 149 Pac. 709.
[7] Idaho Compiled Stats. 1919, § 6780, subd. 1.

mortgage, lien or pledge."[8] The court in the principal case distinguished these cases on the ground that the Idaho statute, which reads "or if originally secured," enlarged the instances specifically mentioned, while the California statute, which reads "if originally secured," limits the application to the three kinds of security mentioned. This distinction does not seem to be well taken, inasmuch as in each case the language in question merely refers back to the three kinds of security mentioned in the first part of the statute and in neither case contemplates any kind of security.

The holding of the principal case, limiting the statute strictly to the three kinds of security mentioned therein, will allow a man who, though he holds a security that is similar and possibly better and safer than a mortgage, lien or pledge, to attach such property where he could not do so if the property be secured by one of those three kinds of security. The principal case involved a conditional sale of personalty, but the reasoning will apply to realty, cases of trust deeds, and other kinds of security.

C. R.

ATTACHMENT: WHEN ISSUED IN ACTIONS FOR BREACH OF CONTRACT.— Does the breach of a contract to deliver goods create an implied contract to respond in damages in the sense that the term "implied contract" is used in the code section providing for the issuance of a writ of attachment "in an action upon a contract, expressed or implied, for the direct payment of money?"[1] The question is answered in the negative by the California court in the case of *Willett v. Alpert.*[2]

At common law an implied contract in its strict sense differs from an express contract only in the matter of the evidence proving its existence. Both are created by the will of the parties, and are the result of the meeting of minds. In the former, the will of the parties is expressed either orally or in writing; in the latter, it is tacitly inferred from circumstances, or in other words, implied "in fact." In its broader sense, however, the term "implied contract" is often used to describe quasi-contractual obligations, or contracts implied in law, which cannot accurately be said to be contracts at all, inasmuch as they do not voice the will of the parties, but consist of obligations imposed by law, perhaps in direct opposition to that will. Neither mutual assent nor consideration is essential to their validity.[3] "In one the intention is disregarded; in the other it is ascertained and enforced. In one the duty defines the contract, in the other the contract defines the duty."[4]

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[8] Mark Means Transfer Co. v. Mackinzie (1903) 9 Idaho 165, 73 Pac. 135. See also Barton v. Groseclose (1905) 11 Idaho 227, 81 Pac. 623.

[1] Cal. Code Civ. Proc., § 537.

[2] (Dec. 8, 1919) 58 Cal. Dec. 523, 185 Pac. 976.

[3] James Barr Ames, History of Assumpsit, 2 Harvard Law Review, 53, 62.

[4] Hertzog v. Hertzog (1857) 29 Pa. St. (5 Casey) 465, 467; Williston's Wald's Pollock on Contracts, p. 11.